United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2002

In The

United States Court of Appeals

For the Second Circuit

ELGIE HOLDING, INC.,

Appellant,

v.

INSURANCE COMPANY OF NORTH AMERICA,

Appellee.

Appeal From a Judgment Entered In Favor of the Defendant

BRIEF FOR THE APPELLANT

+ Appendix

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Preliminary Statement

Appellant, Elgi Holding, Inc., was the owner of certain real property known as 46 Skillen Street, Buffalo, New York, on and prior to a fire loss which was sustained May 7, 1972. The Insurance Company of North America disclaimed liability on an insurance policy which it had written for the aforementioned premises on the grounds that the cause of the fire was an intentional arson perpetrated by the plaintiff. Trial commenced on June 25, 1974, in the United States District Court, Western District of New York, and terminated with a verdict in favor of the defendant on July 3, 1974. The plaintiff made timely motions to set aside the verdict and to order a new trial on the grounds that the verdict was inconsistent with the evidence.

Questions Presented

(1) Whether the verdict of the jury was inconsistent with the evidence presented at trial.

(2) Whether financial status of the plaintiff subsequent to the date of the fire was properly admissible at trial.

(3) Whether the laboratory analysis report was properly admitted in evidence.

Statement of Facts

On May 7, 1972, the premises known as 46 Skillen Street, Buffalo, New York, was totally destroyed by fire. The cause of said fire was officially categorized as mysterious. The Insurance Company of North America which was the underwriter of a fire insurance policy covering said premises disclaimed liability on the basis of arson. The plaintiff, Elgi Holding, Inc., the owner of said property brought suit against the insurance company.

At the time of the fire, the Buffalo Police Department investigated the cause of the fire. Sargent Robert R. Ritchie was assigned by the Buffalo Police to gather information and evidence for official purposes. He testified at trial that he was unable to ascertain either the cause of the fire or who may have been responsible therefor. Accordingly, no accusations were ever placed or filed by the Buffalo Police Department.

During trial of the plaintiff's case offers of proof were made as to the existence of mysteriously caused fires in the neighborhood, testimony establishing the theft of certain property from the premises and syringes, all of which were rejected by the trial court.

The defendant's case was confined to two issues of proof. There were witnesses from various banks who testified as to certain aspects of Lester B. Hall's financial condition, Lester B. Hall being the owner of the plaintiff corporation. In addition,

the defendant produced testimony from a search examiner who conducted an examination of official judgments filed against Mr. Hall and compiled what is known as an abstract report. The abstract report was admitted into evidence over strenuous objection of the plaintiff's counsel. The report itself contained a search of debts and judgments prior to and subsequent to the date of fire. The court permitted the reading to the jury of all entries, including those entries applicable to dates after the fire.

The defendant insurance company retained a professional independent fire investigator to investigate this particular fire. William Alvine testified at trial that in furtherance of his agreement with the Insurance Company of North America to investigate this fire, he went to the premises several months after the fire, made observations and collected samples for the purpose of analysis. He then remitted these samples collected to the Kendall Infared Laboratories of Plainfield, New Jersey. They in turn conducted certain tests and experiments on those specimens and forwarded a report of same to William Alvine. The witness never conducted nor observed any of the experiments nor did he purport to have any expert background in that area. Relying on the report supplied to him, he made conclusions as to the cause of the fire. The report of Mr. Alvine, along with the report supplied to him by the Kendall Laboratory was admitted into evidence over the objection of plaintiff's counsel.

The plaintiff, in rebuttal, offered the testimony of one Dr. Angelo Fatta who was an eminently qualified chemical analyst for the Buffalo Police Department. The court on the record refused to permit plaintiff's counsel any more than ten minutes of direct examination of this witness. Nonetheless, even within the short period of time permitted, Dr. Fatta testified as to the unreliability of the tests, experiments and conclusions formulated by the Kendall Laboratories.

ARGUMENT

POINT I

The motion for new trial should have been granted by the District Court.

The plaintiff, Elgi Holding, Inc. brought timely motion to grant an order for a new trial based on the inconsistency of the verdict pursuant to Rule 59 of FCA. The lower court denied said motion and the Appellant takes appeal. (Order of the court attached as Appendix A)

The proof of defendant is confined to two contentions. First, that the plaintiff had motive to set fire to his premises and second, that the cause of the fire was indeed arson. There was no direct proof as to any involvement by the Appellant. Indeed Sergeant Ritchie, an arson investigator for the Buffalo Police Department, was unable to obtain any information to connect the Appellant to the fire. Accordingly, no accusations were ever made or filed against the Appellant. Nonetheless, the defendant bases their disclaimer of liability to the insured on the defense of arson.

Assuming arguendo that the defendant sufficiently proved the elements of arson and motive it would, nonetheless, be insufficient as a matter of law to validate the defense of arson without connection of the plaintiff to the arson. (*Pacific National Fire Insurance Company v. Mickelson*, 235 F 2d 425)

The Court so aptly paraphrased the law in *Fratto v. Northern Insurance Company of New York*, 242 F Supp. 262 1965, that to successfully defend an action to recover insurance on the grounds of arson the defendant has the absolute burden of proving:

> "(1) That the fire was of incendiary origin, and
> (2) That the plaintiffs were responsible therefor"
> (at 271)

Furthermore, that Court placed great emphasis on the fact that the "police investigation was unable to produce sufficient evidence to warrant any accusation of arson". (at 272)

It is interesting to note that although the Court acknowledged that the evidence in the *Fratto* case strongly pointed to the plaintiff's liability for the fire, nonetheless it held in favor of the plaintiff on the basis that there was no direct evidence linking the plaintiff to the fire.

The essence of the questions and contentions raised here is that the mere proof of arson and motive gives rise only to suspicion and without further proof the defense of arson is fatally defective.

The above concept of requiring some direct proof of responsibility for the arson is well established. The Court in *Pacific National Fire Insurance Company v. Mickelson*, supra, again although acknowledging the proof of financial difficulties and the cause of fire as arson held for the insured since "there was no direct evidence to the effect that plaintiff set the fire". (at 428) (See also *Hanover Fire Insurance Company of New York v. Argo*, 251 F 2d 80 1958)

The defendant produced at trial proof of prior fires which, of course, he submits goes to the element of connecting the plaintiff-appellant with the immediate fire. Such an inference would be and is repugnant to the law. While proof of a prior fire or fires are certainly admissible, such proof is confined to the element of motive and it may not be utilized for the purpose of causal connection. (*Terpstra v. Niagara Fire Insurance Company*, 26 NY 2d 70; 308 NYS 2d 378 1970) By contrast, the Court, in affirming a no cause of action verdict, relied on the fact that the evidence proved that the defendant was at the premises at the time the fire began, that he had removed valuable property just prior to the fire and he had threatened to burn the premises just prior to the actual fire. (*Smimmo v.*

American Union Insurance Company, 273 NYS 2d 895; 26AD 2d 861 1966)

In the case at bar, the only substantial testimony as to the cause of the fire was provided by William Alvine who based his testimony and conclusions primarily on a report he received from the Kendall Infared Laboratories. Among other conclusions, the Kendall Laboratories reported to Mr. Alvine that there was gasoline present on one of the specimens they analyzed. In Mr. Alvine's report he indicates that the detection of gasoline as referred to in the laboratory report was the major significant factor in reaching his conclusion of arson. However, the testimony of Dr. Fatta in rebuttal indicates the scientific impossibility of a finding of gasoline such as the Kendall Laboratories reached. Such testimony put grave doubt as to the merits of William Alvine's conclusions. The evidence, therefore, attempting to establish arson as the cause of the fire, is at best weak.

The Court in its charge to the jury instructed the jurors that they must find from the evidence more than just motive and arson to find for the defendant. Indeed the Court properly instructed the jury that there need be some direct proof linking the plaintiff to the cause and creation of the fire.

There is absolutely no evidence to support the latter element. Moreover, it becomes obvious from the record that the jury could not have possibly followed the instructions of the Court, there being no reasonable interpretation of the evidence to lead any juror to conclude as they did.

The jury having disregarded the Court's instruction as to the applicable law and there being insufficient evidence to give rise to any inference sufficient to sustain the verdict, the lower Court was mandated by Rule 59 of the FCA to order a new trial.

POINT II

The lower court erroneously admitted into evidence the abstract of debts which occurred after the date of the fire.

The defendant raises as one of his major elements of proof that the plaintiff-appellant was in dire financial straits and thus possessed motive to set fire to the premises. To that extent the defendant offered at trial an abstract of debts and judgments prior to and subsequent to the date of the fire.

While it is readily conceded that proof of financial status prior to the fire is an element of the defense and accordingly admissible in evidence, nonetheless the appellant most strongly contends that the admission into evidence of any debts or judgments pertaining to a date subsequent to the fire constitutes reversible error.

In the case at bar, the entire abstract of debts was introduced into evidence over the strenuous objection of appellant's counsel. The abstract indicated approximately $696.00 in debts prior to the fire and some $12,200.00 in debts subsequent thereto. Obviously, the introduction into evidence of $12,200.00 in debts is highly prejudicial to the plaintiff. Nonetheless, said items were admitted into evidence.

In *Carciofolo v. U.S. Fire Insurance Company*, 372 NYS 2d 141; 38 AD 2d 1970, the trial court excluded any evidence pertaining to proof of financial status prior to the fire. The Appellate Division reversed and held that proof of financial losses *prior to* the fire is admissible. Likewise, in *Storm v. Phoenix Insurance Company*, 15 NYS 281 (1891), the court held that questions pertaining to financial losses must be restricted to the time up to the fire.

The practical effect of the additional proof in the case at bar is to alter the total picture of the appellant's financial condition. The property at the time of the fire was valued at approximately

$200,000.00 with only a $24,000.00 mortgage outstanding. The distinction between $696.00 in debts and $12,200.00 in debts is one which renders the proof of debts subsequent to the fire so prejudicial as to create a reversible error.

POINT III

The laboratory analysis report was improperly admitted into evidence.

Mr. Alvine testified on behalf of the defendant and established his profession as a fire investigator. He testified basically that some months after the fire he went to the premises and collected samples of items in addition to making visual observations. He then transferred the items and material that he collected from the premises to a Kendall Laboratory in New Jersey. He testified and made certain conclusions based upon the analysis report which was forwarded to him by the Kendall Laboratory. The report was introduced and admitted in evidence over the strenuous objection of trial counsel for the plaintiff-appellant.

The trial counsel for the plaintiff-appellant opposed the introduction into evidence of the report on the basis that it was hearsay and denied the plaintiff the right to cross-examine. Nonetheless, the report was accepted by the Court. The FCA and the CPLR of the State of New York grants an exception to the hearsay rule of those items deemed to be business records. The question before this Court, as it was before the lower Court, is whether the Kendall Laboratory report qualifies as a business record.

Generally speaking, the concept behind the business record exception is to eliminate large numbers of employees who participated in making entries in business records. (*Harsco Corporation v. Radolitz Realty Corporation*, 307 NYS 2d 531 1969) A business record is defined as a record kept in the or-

dinary course of business and when it is in the ordinary course of business to keep such a record. Reports are generally to be distinguished from business records. In *Pickering v. Freedman*, 300 NYS 2d 742 1969, the Appellate Court held a medical report inadmissible where the expert was unavailable to testify. The defendants in that case had a doctor examine the plaintiff and forwarded to the defendant a report of the examination. It was held that such a record or report does not fall within the business records exception. Moreover, it had been held that reports prepared for parties for the purpose of possible litigation would likewise be inadmissible as business records. (*Yates v. Bair Transport, Inc.*, DCNY 249 F. Supp. 681 1965) Following that same concept is *People v. Samuels*, 302 NY 163 (1912) which held that where an assistant district attorney had a doctor examine the defendant, the report of the examination would not be admissible as a business record.

Laboratory tests in particular may not be introduced in evidence unless there is a foundation laid to show the nature of the tests, the procedures and testimony to show the reliability of the tests performed. (*Brown v. Murphy*, 43 AD 2d 524; 348 NYS 2d 777 1973).

In the case at bar, in connection with *Brown v. Murphy*, supra., the plaintiff called in rebuttal Dr. Fatta who offered testimony as to the propriety of the tests and comclusions made by the Kendall Laboratory. Initially compounding the prejudice created by the improper admission of the laboratory report is the fact that the Court precluded and limited the plaintiff in producing the testimony of Dr. Fatta. The attempt by the plaintiff to rebut and mitigate the extreme prejudice of the laboratory report was effectively undermined by the Court's limitation of time. The total effect of the inadmissibility of the Kendall Laboratory report and the Court's interference with the right of the plaintiff to present relevant and important testimony was to create a grave and undue prejudice upon the plaintiff.

Such prejudice can only be rectified by a reversal of the lower Court's decision.

Moreover, the inadmissible laboratory report being as it is the primary basis upon which William Alvine based his testimony renders all of his conclusions subject to the same error attributed to the admissibility of the report itself.

In the face of these extreme errors and prejudice the verdict cannot stand and the plaintiff respectfully urges this Court to rectify this injustice.

CONCLUSION

It is respectfully submitted that the lower Court erred in permitting any proof of financial condition subsequent to the fire and the admission into evidence of the Kendall Infared Laboratory report. Moreover, the plaintiff respectfully urges this Court to reverse the lower Court's denial of a motion for new trial due to the inconsistency of the evidence and the verdict.

DATED: Buffalo, New York
November 24, 1974

Respectfully submitted,

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APPENDIX A

Order of The Court

Order of The Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ELGI HOLDING, INC.,

Plaintiff,

vs.

INSURANCE COMPANY OF NORTH AMERICA,

Defendant.

Civil 1972-604

APPEARANCES:

F. BERNARD HAMSHER, Esq., Buffalo, New York, for Plaintiff.

OHLIN, DAMON, MOREY, SAWYER & MOOT (RICHARD E. MOOT, Esq., of Counsel) Buffalo, New York, for Defendant.

On July 3, 1974, the jury returned a verdict of no cause of action against the plaintiff in this case and the judgment was entered for the defendant. On July 9, 1974, the plaintiff moved for judgment notwithstanding the verdict, and for a new trial. Citing *Mosley v. Cia. Mar. Adra S.A.*, 362 F.2d 118 (2d Cir. 1966). *Rawls v. Daughters of Charity of St. Vincent de Paul, Inc.*, 491 F.2d 141 (5th Cir. 1974), and *Oliveras v. American Export Isbrandtsen Lines, Inc.*, 431 F.2d 814 (2d Cir. 1970), the defendant argues that the motion pursuant to Rule 50 must be denied because plaintiff failed to move for a directed verdict upon the close of all the evidence at trial. On that ground alone, the motion pursuant to Rule 50(b) of the Federal Rules of Civil Procedure should be denied. Furthermore, considering the

evidence, the court concludes that the motions should be denied on the merits.

In this case, plaintiff sought to obtain the proceeds of a fire insurance policy issued by the defendant. A Buffalo fire inspector and a fire investigator retained by the defendant reached similar conclusions independently and the jury was entitled to conclude that the fire was deliberately set. Although there is no direct proof that plaintiff caused the fire, nevertheless there was circumstantial evidence from which the jury could conclude that plaintiff did. The plaintiff was in dire financial circumstances and mortgage foreclosure proceedings were threatened against him. A few days before the fire, he took out additional business interruption insurance and, from his testimony, the jury was entitled to conclude that he testified falsely in regard to material matters.

For these reasons, the plaintiff's motions for judgment, notwithstanding the verdict, and for a new trial are denied.

So ordered.

/s/ JOHN T. CURTIN
John T. Curtin
United States District Judge

DATED: August 2, 1974

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AFFIDAVIT OF SERVICE

November 27, 1974

RE: Elgie Holding Inc. vs Insurance Company of North America

STATE OF NEW YORK)
COUNTY OF MONROE) ss.:
CITY OF ROCHESTER)

John S. May , being duly sworn, deposes and says:

That he is associated with The Daily Record Corp. of Rochester, New York, and is over twenty-one years of age.

That at the request of F. Bernard Hamsher
Attorney(s) for Appellant
(s)he personally served three (3) copies of the printed [~~Record~~] [Brief] [~~Appendix~~] of the above-entitled case addressed to:

Ohlin, Damon, Morey, Sawyer & Moot
1800 Liberty Bank Bldg.
Buffalo, New York 14202

by depositing true copies of the same securely wrapped in a postpaid wrapper in a Post Office maintained by the United States Government in the City of Rochester, New York.

John S. May

Sworn to before me this 27th
day of November, 19 74

Ellen A. DeFendis

Notary Public
Commissioner of Deeds

ELLEN A. DEFENDIS, Notary Public
State of New York, County of Monroe
Commission Expires March 30, 19 75